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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Robin R Kavanaugh,

10 Plaintiff,

11 v.

12 Commissioner of Social Security
13 Administration,

14 Defendant.

No. CV-19-04771-PHX-MTL

ORDER

15 Before the Court is Defendant's unopposed Motion to Alter or Amend Judgment
16 pursuant to Fed. R. Civ. P. 59(e) (Doc. 22). Defendant seeks to amend the Court's June 12,
17 2020 Order (Doc. 20) "to promote judicial economy and avoid the likelihood of an appeal."
18 (Doc. 22 at 3.) Plaintiff does not object to the motion.

19 Specifically, Plaintiff argued in her briefing that, among other things, remand was
20 appropriate because the Administrative Law Judge (ALJ) that conducted Plaintiff's hearing
21 was not properly appointed under the Appointments Clause of United States Constitution.
22 (Doc. 13 at 8-12; Doc. 19 at 5-6) The Court rejected this argument on grounds that Plaintiff
23 waived her Appointments Clause argument by failing to raise it before the ALJ. (Doc. 20
24 at 10-12.) The Court also cited various authorities holding that a social security plaintiff
25 waives an Appointments Clause argument by failing to raise it before the ALJ. *See, e.g.,*
26 *Younger v. Comm'r of Soc. Sec. Admin.*, No. CV-18-02975-PHX-MHB, 2020 WL 57814,
27 at *5 (D. Ariz. Jan. 6, 2020); *Samuel F. v. Berryhill*, Case No. CV 17-7068-JPR, 2018 WL
28 5984187, at *2 n.6 (C.D. Cal. Nov. 14, 2018) (Doc. 20 at 11).

1 Defendant now requests a remand because “it was not initially not clear during the
2 litigation” that Plaintiff raised her Appointments Clause argument before the Appeals
3 Council. (Doc. 22 at 1.) The Court notes that the Administrative Record in this case did
4 indicate that Plaintiff raised the Appointment Clause argument in a cover letter enclosing
5 her Request for Review of Hearing Decision/Order to the Appeals Council (R. at 237), and
6 in a separate letter to the Appeals Council. (R. at 383.) Nonetheless, because Plaintiff raised
7 this argument for the first time in her reply brief, the Court deemed the argument to be
8 waived. (Doc. 20 at 11 n.4).

9 Defendant now states that the Commissioner’s position before this and other courts
10 “has been to argue that an Appointments Clause challenge has been forfeited only in those
11 cases where a claimant did not raise the issue at some point during the administrative
12 proceedings.” (*Id.* at 2.) To “promote judicial economy and avoid the likelihood of an
13 appeal,” Defendant now seeks to amend the Court’s June 12, 2020 Order and judgment,
14 and for the Court to enter a new Order remanding for further proceedings. (*Id.* at 3.)
15 Defendant notes that this is an “unusual request.”

16 Rule 59(e) provides that a party may move for amendment to a judgment within 28
17 days of entry of the judgment. Fed. R. Civ. P. 59(e). The Court may grant a motion under
18 Rule 59(e) if the court is presented with newly discovered evidence, if the court committed
19 clear error, if the initial decision was manifestly unjust, or if there is an intervening change
20 in controlling law. *Zimmerman v. City of Oakland*, 255 F.3d 734, 740 (9th Cir. 2001). A
21 district court has “considerable discretion” in granting or denying Rule 59(e) motion.
22 *McDowell v. Calderon*, 197 F.3d 1253, 1255 n.1 (9th Cir. 1999) (citation omitted).

23 Here, the Court finds that the initial decision was manifestly unjust in light of
24 Defendant’s assertion that in other cases, its position before this and other Courts has been
25 to argue that an Appointments Clause challenge has been forfeited only “where a claimant
26 did not raise the issue at some point during the administrative proceedings.” (Doc. 22 at 3.)
27 The Court does not believe that its prior Order contained legal error. Nonetheless, in the
28 interests of judicial economy and consistent treatment of litigants, the Court will grant

1 Defendant's motion. Accordingly,

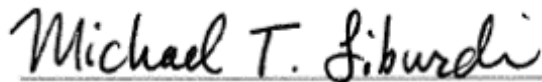
2 **IT IS ORDERED granting** the Motion to Alter or Amend Judgment pursuant to
3 Fed. R. Civ. P. 59(e) (Doc. 22).

4 **IT IS FURTHER ORDERED** amending the Court's prior Order and Judgment
5 (Docs 20, 21), to the extent inconsistent with this Order, and remanding the matter to the
6 Commissioner of Social Security Administration for further proceedings.

7 **IT IS FURTHER ORDERED** that on remand, the Appeals Council shall direct the
8 Administrative Law Judge (ALJ) to offer Plaintiff the opportunity for a new hearing with
9 a different ALJ; further consider the nature and severity of Plaintiff's mental impairments;
10 further evaluate Plaintiff's residual functional capacity; reconsider whether Plaintiff can
11 perform her past relevant work; take any further action needed to complete the
12 administrative record; and issue a new hearing decision.

13 **IT IS FINALLY ORDERED** directing the Clerk of the Court to enter an amended
14 judgment accordingly. This matter shall remain closed.

15 Dated this 11th day of August, 2020.

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18 Michael T. Liburdi
19 Michael T. Liburdi
20 United States District Judge
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